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Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

C. BRENT SCOTT, and
LAW OFFICES OF C. BRENT SCOTT, P.C.,

Petitioners,

v.

STATE BAR OF CALIFORNIA,

Respondent.

On Petition for Writ of Certiorari to the State Bar Court of the State of California

PETITION FOR WRIT OF CERTIORARI

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84 pp

QUESTIONS PRESENTED FOR REVIEW

1. May a State Bar Court, consistent with the Due Process Clauses of the Fifth and Fourteenth Amendments, find that an attorney, who was sanctioned $218,299.10, had no probable cause to file lawsuits, and therefore suspend or disbar him, after he had overcome a demurrer and two summary judgment motions in that first lawsuit and the other lawsuits were attempts to overturn the sanctions award?

2. May a State Bar Court, consistent with the Due Process Clauses of the Fifth and Fourteenth Amendments, suspend or disbar an attorney without finding that due process was accorded the attorney by the trial judge who imposed punitive sanctions on the attorney but had not accorded him (1) the right and time to respond in writing to opposing counsel's written motion for sanctions, (2) the right to contest in a full evidentiary hearing the work and time which the bills represented, and (3) the right to have the hearing held before an unbiased judge?

3. Is California Business and Professions Code section 6068, subdivisions (c) and (g), unconstitutional as vague and overbroad because the standards by which attorneys must measure their conduct are undefined and subjective?

LIST OF PARTIES

The parties to the proceedings below were the petitioners, C. Brent Scott, an individual, and the Law Offices of C. Brent Scott, a Professional Corporation, and the respondent, the State Bar of the State of California.

The Professional Corporation, Law Offices of C. Brent Scott, has no parent companies or nonwholly owned subsidiaries to list.

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1. THE DECISION BELOW VIOLATES FUNDAMENTAL PRINCIPLES OF DUE PROCESS, HIGHLIGHTS A CONFLICT BETWEEN FEDERAL CIRCUIT COURTS AND HAS PROFOUNDLY DISTURBING IMPLICATIONS FOR PLAINTIFFS' ATTORNEYS THROUGHOUT THE COUNTRY WHEN AN ATTORNEY, WHO WAS SANCTIONED $218,299.10, HAD PROBABLE CAUSE TO FILE THAT ACTION, AND WHEN THE REMAINING THREE ACTIONS WERE FILED ON DIFFERENT CAUSES OF ACTION IN AN ATTEMPT TO OVERTURN THE PUNITIVE SANCTIONS LEVIED AGAINST HIM BY A JUDGE WITH CLOSE TIES TO THE DEFENDANTS, WITHOUT ADVANCE NOTICE OF THE REASONS FOR THE SANCTIONS' HEARING, AND

WITHOUT ACCORDING THE ATTORNEY AN EVIDENTIARY HEARING. 14

2. THE DECISION BELOW, BY IMPOSING DISCIPLINE ON PETITIONER OCCASIONED BY THE PUNITIVE SANCTIONS AWARD LEVIED AGAINST HIM WITHOUT INQUIRING INTO THE FACT THAT THE TRIAL COURT DID NOT ACCORD HIM THE RIGHT AND TIME TO RESPOND IN WRITING TO THE CHARGES, THE RIGHT TO CONTEST IN A FULL EVIDENTIARY HEARING THE WORK AND TIME WHICH OPPOSING COUNSELS' DECLARATIONS SET FORTH AND THE RIGHT TO HAVE THE HEARING HELD BEFORE AN UNBIASED JUDGE, VIOLATES THE ATTORNEY'S CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW AND TO A JURY TRIAL. 20

3. SECTION 6068, SUBDIVISIONS (c) AND (g), OF THE CALIFORNIA BUSINESS AND PROFESSIONS CODE IS UNCONSTITUTIONAL AS VAGUE AND OVERBROAD BECAUSE THE STANDARDS BY WHICH ATTORNEYS MUST MEASURE THEIR CONDUCT ARE UNDEFINED AND SUBJECTIVE. 25

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IN THE
SUPREME COURT OF THE UNITED STATES

C. BRENT SCOTT, et al.,

Petitioners,

v.

STATE BAR OF CALIFORNIA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE STATE BAR OF CALIFORNIA

Petitioners C. Brent Scott, an individual, and the Law Offices of C. Brent Scott, a Professional Corporation, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the State Bar Court of California Review Department, entered on October 25, 2002.

OPINIONS BELOW

The Opinion of the State Bar Court Review Department is reported at ___ State Bar Ct. Rptr. ___ [2002 Calif. Op. *Lexis* 5]. [A.1] [1] The order of the Supreme Court of California denying

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[1] The Appendix is filed under separate cover, and is cited to as "A. . ." followed by the page number. References to the Reporter's Transcript of the State Bar Court trial are shown as "RI," "RII," and "RIII," (for each of the three volumes) followed by the page number, and "Exh." plus the number for the trial exhibits, which were numbered 1 - 57

petition for review is reproduced at A 26 and found at 2003 Cal. *Lexis* 3499. Excerpts from the opinion of the trial judge of the U.S. Bankruptcy Court are found at A 28. The Decision and Order Imposing Public Censure and Order Barring Judge Ross From Receiving Assignments is at A 36. The Request to Take Judicial Notice of Bankruptcy Court Findings, which was denied, is at A 39. Rule 953 of the California Rules of Court, showing the finality of the Supreme Court denial - which was not served on Scott - is found at A 42.

JURISDICTION OF THIS COURT

The judgment of the State Bar Court of California, Review Department was entered on October 25, 2002 and certified for publication. Petitioner's petition for review to the California Supreme Court was timely filed and was denied by that court on May 13, 2003, without being served on petitioner, who first saw it on the court's internet page on or about June 21, 2003, after a colleague brought it to his attention. That order became final on June 13, 2003. Under the rule set forth in *Puget Sound Power & Light Co. v. King County*, 264 U.S. 22, 23-25 (1924) and cited by *Marquette Nat'l. Bank v. Omaha Service Corp.*, 439 U.S. 299, 307 n. 18 (1978), petitioner's time to petition for certiorari would expire at the earliest on September 11, 2003. On August 29, 2003, Justice O'Connor signed an order extending the time for filing this petition for certiorari to and including October 13, 2003.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a) (1988).

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for the State Bar and 100 - 168 for Scott. Exh. 15A-H was the Reporter's Transcript of the underlying superior court trial in Scott v. Krissman, and that exhibit number will be followed by the page numbers of that transcript.

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. I provides, in relevant part: "Congress shall make no law . . . abridging the . . . right of the people . . . to petition the Government for a redress of grievances."

U.S. Const. amend. V provides, in relevant part: "No person shall be . . .deprived of life, liberty or property, without due process of law. . . ."

U.S. Const. amend. VII provides, in relevant part: ". . .In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.. . . ."

U.S. Const. amend. XIV, §1, provides, in relevant part: ". . .nor shall any state deprive any person of life, liberty or property, without due process of law. . . ."

California Business and Professions Code § 6106 states:

"The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension.

If the act constitutes a felony or misdemeanor, conviction thereof in a criminal proceeding is not a condition precedent to disbarment or suspension from practice therefor."

California Business & Professions Code § 6068, provides, in relevant part:

"It is the duty of an attorney to do all of the following:

. . .

(c) To counsel or maintain those actions, proceedings, or defenses only as appear to him or her legal or just, except the defense of a person charged with a public offense. . .

(g) Not to encourage either the commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest."

California Code of Civil Procedure, section 437c, states, in relevant part:

"(a) Any party may move for summary judgment in any action or proceeding if it is contended that the action has no merit or that there is no defense to the action or proceeding. ..

(b) The motion shall be supported by affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice shall or may be taken. . .

(c) The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. In determining whether the papers show that there is no triable issue as to any material fact the court shall consider all of the evidence set forth in the papers, except that to which objections have been made and sustained by the court, and all inferences reasonably deducible from the evidence, except summary judgment shall not be granted by the court based on inferences reasonably deducible from the evidence, if contradicted by other inferences or evidence, which raise a triable issue as to any material fact. "

California Code of Civil Procedure § 128.5 states in relevant part:

"(a) Every trial court may order a party, the party's attorney, or both to pay any reasonable expenses, including attorney's fees, incurred by another party as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay. . .

(b) For purposes of this section:

(1) 'Actions or tactics' include, but are not limited to, the making or opposing of motions or the filing and service of a complaint or cross-complaint only if the actions or tactics arise from a complaint filed, or a proceeding initiated, on or before December 31, 1994. The mere filing of a complaint without service thereof on an opposing party does not constitute 'actions or tactics' for purposes of this section.

(2) 'Frivolous' means (A) totally and completely without merit or (B) for the sole purpose of harassing an opposing party.

(c) Expenses pursuant to this section shall not be imposed except on notice contained in a party's moving or responding papers; or the court's own motion, after notice and opportunity to be heard. An order imposing expenses shall be in writing and shall recite in detail the conduct or circumstances justifying the order. . . ."

California Rules of Court, rule 951.5, states:

"Upon review pursuant to rule 301 of the Rules of Procedure of the State Bar of California, or such other rule as may be adopted governing the review of any decisions, orders or rulings by a hearing judge that fully disposes of an entire

proceeding, the Review Department of the State Bar Court shall independently review the record and may adopt findings, conclusions, and a decision or recommendation at variance with those of the hearing judge."

California Rules of Court, rule 952, states, in relevant part:

"A petition to the Supreme Court by a member to review a decision of the State Bar Court recommending his or her disbarment or suspension from practice shall be filed within 60 days after the filing with the Clerk of the Supreme Court of a certified copy of the decision complained of. . . ."

STATEMENT OF THE CASE

This case began on February 21, 1989, when attorney Joel Krissman ("Krissman") made an unsolicited telephone call to James Cooke ("Cooke"), who, along with Mrs. Cooke, was a client of petitioner Brent Scott ("Scott"). [Exh. 15B:126-127] Krissman, knowing Scott was representing the Cooks as a result of Mr. Cooke's severe injury on a construction job, disparaged Scott as an attorney and touted his own firm's abilities to handle Cooke's case better than Scott could do. [Exh. 15B:127, 164] Krissman set an appointment with Mr. Cooke. [Exh. 15B:128-129]

Scott telephoned the Krissman firm seeking to ascertain why they were attempting to "steal" his clients, but the partners with whom he spoke had no knowledge of the call, assured him that Krissman or someone else would get back to him, and then never called him. [Exh. 15B:130-131, 659-662, 776-777]

The Cooke/Krissman appointment remained on calendar, and in an effort to protect his attorney/client relationship with the Cookes, Scott filed and served a lawsuit

against Krissman and his firm alleging intentional interference with his contract with the Cookes. [Exh. 15E: 663, 667]

The encounter with Krissman left the Cookes highly concerned about whether they had obtained a qualified attorney to handle their case, causing them not to sleep after the telephone call. [Exh. 15B:164, 168-169] While they ultimately did remain as clients of Scott, Scott testified that he spent substantial time, energy and money to retain the client's business, before obtaining for the client a settlement of $5.2 million. [RI-77, Exh. 15:598-599][2]

The Krissman firm made several efforts to get the case dismissed before trial, filing a demurrer and two motions for summary judgment. [Exhs. 105, 107, 15E:649] These efforts were decisively rejected by three different judges. (*Id.*) Petitioner made a good faith effort to settle the case before trial for $5,867.40, a fraction of his costs to that point. The offer was summarily rejected by the Krissman firm. [RI-88-89, Exh. 106] The petitioner also sought redress before trial with the State Bar of California, but was told that his only option was to pursue the matter in court. [Exh. 102]

Petitioner presented eight days of testimony before a jury. At the close of that testimony the trial judge, Judge James Ross, without explanation or argument by petitioner, granted the nonsuit motion of the defendants and, *sua sponte*, ordered a hearing to be held under California Code of Civil Procedure, section 128.5, as to sanctions against petitioner. [Exhs. 11, 13, 15G:935] Judge Ross invited the defendants to submit their written motion for attorney fees and ordered petitioner to file papers relating to the sanctions issue on the same date as

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[2] Scott estimated he had spent an additional $80,000 retaining the Scott's business before settling the case.

defendants' motion was due, without affording petitioner notice of his reasons for conducting the sanctions hearing and effectively denying him the opportunity to read and respond in a meaningful manner to the motion. [Exhs. 116, 119, 15G:936, RI-92]

At the sanctions hearing, the judge, before any presentations had been made, stated that he was "ready to rule." [Exh. 15G:941, RI-92] The defendants, along with their motion, had submitted declarations from nine attorneys and three expert witnesses, for costs purportedly incurred in their defense of the case. [Exhs. 114, 115][3] Judge Ross denied petitioner any opportunity to present witnesses on his own behalf or to examine the declarants under oath. [Exh. 15H: 961-962] Over petitioner's carefully articulated objections based on his constitutional rights to due process and to a jury trial, the judge assessed petitioner costs in the amount of $218,299.10. [Exhs. 14, 15H:943-953, 956, 961-963.]

Before the sanctions order was signed, petitioner filed and sought to serve on the judge a statement of disqualification based upon newly discovered evidence of the judge's admitted longstanding friendship and professional relationship with members of defendants' firm and upon the judge's hostile conduct towards petitioner throughout the trial. [Exhs. 121, 126, RI-93] Petitioner had also discovered that Judge Ross, along with Krissman partner Tom Stolpman, was still a member of the Los Angeles Trial Lawyers' Association ("LATLA"), the only judge to ever remain a LATLA member

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[3] Atty. Baker's declaration stated his fees were $250 an hour and that he had spent 270.5 hours of time, for a total bill of $67,625. [Exh. 114, last page.] Not until much later was it learned that he had submitted billings to Home Insurance Co. for that same lawsuit showing he had spent 69.25 hours before trial, with 13.75 hours billed at $125 per hour and the remainder at $175 for a total of $11,431.25. [Exh. 166]

after taking the bench; that both Judge Ross and Mr. Stolpman were past presidents of LATLA [Exh. 129]; that Mr. Stolpman had told a juror that he had known Judge Ross personally for over 20 years [Exh. 126]; that Judge Ross and partners in the Krissman firm had frequent social contacts [Exhs.126, 129] that during the time period shortly before trial, during trial, and shortly after trial, a total of 81 phone calls were placed from Judge Ross' courtroom and/or chambers to the Krissman firm while none were placed to Scott's office [Exhs. 126, 129].

Other examples of bias include the following: during the trial, the judge made and sustained his own objections. [Exh. 121, p. 9] Judge Ross never required the defendants to make an offer of proof on the relevancy of any evidence which was objected to by plaintiff. [Exh. 121, p. 9]
Mr. Stolpman was also allowed to sit in close contact with the jurors and to laugh and joke with them throughout the trial. [Exh. 121, p. 9:22-10:3] Judge Ross refused to grant side-bars requested by the plaintiffs' attorney during the examination of the plaintiff but never refused a side-bar when requested by the defense attorney. [Exh. 121, p. 10:4-7] When the defense attorney cross-examined witnesses, he was allowed to exceed the scope of the direct examination, but the same latitude was not allowed plaintiff on redirect. [Exh. 121, p. 10:8-11] The judge allowed the defense attorney to directly point his finger in the plaintiff's face during the defense's opening statement, but when requested by plaintiff to stop such insulting behavior, the judge refused to take any action. [Exh. 121, p. 10:12-17] In that chambers' visit, the judge told the jury that the case was frivolous and a waste of time, and explained to them that he had ordered a sanctions hearing against plaintiff. [Exh. 121, 15:6-12] When Mr. Scott attempted to put on evidence to rebut totally inappropriate statements made by defense counsel Baker in his opening statement, where he indicated that respondent didn't handle one or more other cases correctly, Judge Ross said the evidence was totally irrelevant, though he

had allowed the prejudicial comments in the opening statement. [Exh. 15D, 448:15 - 449:22] When respondent's co-counsel tried to argue damages, Judge Ross rather sarcastically brought up the amount of fee received by Mr. Scott for the Cookes' case and implied that the fee offset all damages claimed by respondent. [Exh. 15G, 917:7 - 918:16]

During the questioning of both Mr. Stolpman and Mr. Krissman by their counsel, Judge Ross interrupted several times to ask questions about mutual personal friends and/or acquaintances. [Exh. 121, 3:21-25]

When the process server attempted to serve Judge Ross with a statement of disqualification on the afternoon of February 11, 1992, before the sanctions order was signed, his clerk stated the judge was not there, although the process server saw him. There were two phone calls from Judge Ross' chambers or courtroom to Attorney Baker (defending the Krissman firm) immediately after the process server had attempted service. [Exh. 150:552-553][4] Because February 12, 1992 was a legal holiday, no mail was delivered to Judge Ross' courtroom until after 9:00 a.m. on February 13, 1992. The judgment on nonsuit and the order for sanctions were mailed by Baker's secretary on February 12, 1992, according to the proof of service. Yet Judge Ross stated that both documents were on his desk at 8:30 a.m. on February 13, 1992, and he signed them before accepting service of the statement of disqualification. [Exh. 37:20, RI:110-112]

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[4] During the time before, during and immediately after trial, there were 79 telephone calls placed from Judge Ross' courtroom to Atty. Baker's firm [Exhs.37:19, 145, 146:507-508, 550-551, 551-552, 549-550, 149], and 2 to Krissman's firm [Exhs 149, 150:552-556] There were no phone calls to Scott's law firm. [Exhs. 145, 146]

Scott exhausted his appeal rights in California state courts, without success. [Exhs. 132, 133, 135] In January of 1995 Scott, after consultation with other attorneys and additional research based on their information, filed a federal civil rights action against Krissman, Judge Ross and Robert Baker. [Exhs. 16, 138] After denial of motions to dismiss made by all three defendants in that action, the federal court was compelled to dismiss the action based on lack of subject-matter jurisdiction, without any hearing on the merits. [Exh. 140, RI:125-127]

After further consultation with other attorneys, Scott filed an action for equitable relief against Krissman and his firm on September 15, 1995, based on extrinsic fraud. [Exhs. 25, 157, RI:127-128] Defense motions to require Scott to furnish security, to name Scott as a vexatious litigant, a demurrer, a motion for summary judgment and a motion for reconsideration of the denial of summary judgment were all denied or overruled by the trial judge. [Exhs. 158-163] The Krissman firm's petition for a writ of mandate to the court of appeal was also denied. [Exh. 164] The court granted a nonsuit in that case. [RI-131]

Having discovered the discrepancies in Baker's billings (see footnote 3, *infra*) as a result of testimony in the equitable action, and having recently been subjected to a continuing pattern of defamatory statements by Judge Ross, by then retired, to other superior court judges, Scott filed an action against Ross and Baker in November of 1996 for fraud and defamation. [Exh. 37, RI-133-134] A defense demurrer was sustained without leave to amend, based on the statute of limitations and the application of collateral estoppel, even though Scott had only discovered the Baker's billing discrepancies just a few months earlier during the third action, and the defamation action against Judge Ross had been brought for the first time in that action. [Exh. 38] That defamation had only

begun in 1996, after Ross had retired from the bench in July of 1995. Nevertheless, Scott chose not to appeal the judgment, due to severe family medical problems in the diagnosis of a son with a brain tumor. When Judge Ross retired in 1995 he had several complaints pending against him with the California Commission on Judicial Performance. On April 30, 1998, that commission issued its Decision and Order Imposing Public Censure and Order Barring Judge Ross From Receiving Assignments. [A. 35]

On December 17, 1996, the State Bar of California filed disciplinary charges against petitioner for alleged violations of Business and Professions Code sections 6106, 6068(c) and 6068(g).[5] [Exh. C of petitioner's Petition for Review to CA Supreme Court.] After a trial, the State Bar Court judge, on October 5, 2000, rendered a decision recommending actual suspension of petitioner from the practice of law, even though the State Bar's recommendation had been only for a short stayed suspension. [A. 25] That decision found Scott not culpable of any wrongdoing as to the filing of the first three actions; it was based solely on the fourth action against Ross and Baker in 1996. Scott had been forced to file bankruptcy in 2000, and in an adversary proceeding by the Krissman firm, wherein most of the same testimony heard in the original trial was taken again, the federal judge found that "Scott did not willfully intend to injure plaintiffs," that he was credible, and that he had a "legal just cause . . .to vindicate his rights, and to protect himself and his client in his relationship with his

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[5] Thomas Stolpman, one of the senior partners at the Krissman firm, and a long-time friend of Judge Ross, was a member of the State Bar Board of Governors at the time the first action was filed against the Krissman firm, and became president of the State Bar the following year. [RI:119, 138] Mr. Stolpman was CTLA president in 1983 and gave a strong recommendation and assistance for Judge Ross being appointed to the Superior Court bench. [Exh. 121, 5:4-8]

client." [A. 26-34]

After an appeal to the Review Department of the State Bar Court by both Scott and the State Bar, that appellate department issued a published opinion in which it found that the record clearly and convincingly demonstrated that respondent was culpable as to all four lawsuits of filing and pursuing frivolous actions in bad faith and for a corrupt motive. It affirmed the discipline recommendation of the trial judge, for a suspension of two years, stayed, with actual suspension for 60 days, and probation for two years, with a requirement to take and pass the Multistate Professional Responsibility Exam within one year, and pay the costs of the State Bar.

How the federal questions were preserved.

Petitioner first raised the question of due process in his first appeal from the order granting the sanctions against him. Except for the court of appeal stating in its opinion that Scott had been given a sufficient hearing on the sanctions, the issue was not addressed by that court. The entire State Bar Court trial was about the lack of fairness in the original trial of the action against the Krissman firm, and the State Bar Court judge found no culpability on Scott's part as to the first three lawsuits he filed, but did find culpability as to the fourth one. On appeal to the Review Department, however, that decision held Scott culpable in general for all four actions. [A 1-25] In his Petition for Review to the California Supreme Court, Scott raised the issues of violation of his right to due process and of the unconstitutionality of California's Business and Professions Code sections 6106, 6068(c) and 6068(g).

The status and jurisdiction of the State Bar Court.

The California State Bar Court was created by the Supreme Court of California through adoption of Rules of

Court on March 19, 1956, pursuant to the provisions of California Business and Professions Code section 6102. Its authority is defined in California Rules of Court, rule 951. The standard of review for the State Bar Court Review Department is a de novo review, as set forth in rule 951.5. State Bar Court judges are appointed by the California Supreme Court, pursuant to rule 961. Review of State Bar Court decisions is first by the State Bar Court Review Department, and then by petition for review to the California Supreme Court (rule 952), thus paralleling the other state courts which provide for review of a superior court decision by a district court of appeal, and review of that court's decision through a petition for review to the California Supreme Court.

REASONS FOR GRANTING THE PETITION

I.

THE DECISION BELOW VIOLATES FUNDAMENTAL PRINCIPLES OF DUE PROCESS, HIGHLIGHTS A CONFLICT BETWEEN FEDERAL CIRCUIT COURTS AND HAS PROFOUNDLY DISTURBING IMPLICATIONS FOR PLAINTIFFS' ATTORNEYS THROUGHOUT THE COUNTRY WHEN AN ATTORNEY, WHO WAS SANCTIONED $218,299.10, HAD PROBABLE CAUSE TO FILE THAT ACTION, AND WHEN THE REMAINING THREE ACTIONS WERE FILED ON DIFFERENT CAUSES OF ACTION IN AN ATTEMPT TO OVERTURN THE PUNITIVE SANCTIONS LEVIED AGAINST HIM BY A JUDGE WITH CLOSE TIES TO THE DEFENDANTS, WITHOUT ADVANCE NOTICE OF THE REASONS FOR THE SANCTIONS' HEARING, AND WITHOUT ACCORDING THE ATTORNEY AN EVIDENTIARY HEARING,.

This case raises a constitutional issue of first impression

which has profoundly disturbing implications for plaintiffs' attorneys throughout the country, for their clients, and for the very meaning of advocacy in an adversarial system: may an attorney be disciplined for having substantial punitive sanctions imposed on him after he proceeded to trial and lost the case where three prior judges had overruled a demurrer and denied two motions for summary judgment? Inherent in that question is the additional question of whether the state's legal disciplinary agency can ignore the state law that denial of a summary judgment motion itself is evidence of probable cause to bring the action?

Among the basic procedural protections that are a part of constitutional due process are the standards and quanta of proof by which the substantive rights of litigants are determined. See *In re Winship*, 397 U.S. 358 (1970). Where particular standards and quanta of proof have been found to place undue "risks of error" on a litigant or to be otherwise inconsistent with the purposes they were designed to serve, this Court has not hesitated to hold such standards and quanta to be violative of the Due Process Clauses of the Fifth and Fourteenth Amendments. See, e.g., *Addington v. Texas*, 441 U.S. 418, 427 (1979); *Santosky v. Kramer,* 455 U.S. 745, 754, 764 (1982); *In re Winship, supra,* 397 U.S. 358.

Although the inconsistent application of standards and quanta of proof required for summary judgment on the one hand, and the imposition of sanctions on the other, has not been squarely subjected by this Court to constitutional due process scrutiny, two circuit courts of appeals, which have been confronted by similar claims, have handed down decisions under federal rules of procedure which run in starkly different directions. On the one hand, the Third Circuit in *Gillette Foods Inc. v. Bayernwald-Fruchtverwertung*, 977 F.2d 809, 814 (3d Cr. 1992), in reversing a federal district court's exercise of its "inherent power" to impose

$25,000 sanctions on plaintiff's counsel, held that the imposition of such sanctions was "inconsistent" with the fact that plaintiff's pleadings had survived three summary judgment motions, a motion for involuntary dismissal made at trial, as well as a motion for sanctions under Fed. R. Civ. P. 11 and had to be overturned. See also *Klein v. Stahl GMBH & Co.*, 185 F.3d 98, 110 (1999). The lower court's imposition of sanctions was vacated even though the trial judge had found that the evidence at trial demonstrated that plaintiff's claim against one of the defendants was "utterly without merit both factually and legally" and even though the inclusion of that defendant was deemed to have been "an egregious litigation tactic" employed in "bad faith." It was the Third Circuit's view that a denial of summary judgment should ordinarily be sufficient to preclude a finding of "bad faith" necessary to the imposition of attorney sanctions under the court's common law powers.

On the other hand, a dramatically different result was reached by the First Circuit in *Muthig v. Brant Point Nantucket, Inc.*, 838 F.2d 600 (1st Cir. 1988), which held that the fact that a plaintiff's pleadings survived a summary judgment motion did not automatically preclude the issuance of Rule 11 attorney sanctions, at least where subsequent depositions revealed the prior existence of a factual dispute to have been "illusory." In so ruling, that Court, per Breyer, C.J., remarked in broad dicta that the federal "summary judgment standard (based on filed documents) and Rule 11's standard (based on what reasonable inquiry should have revealed, perhaps about other information)" were not "necessarily or inevitably congruent," and thus, impliedly, did not require congruent treatment.

In California, the Supreme Court approved the holding in *Roberts v. Sentry Life Insurance*, 90 Cal. Rptr. 2d 408, 413 (1999) that denial of a summary judgment motion establishes probable cause for the bringing of the lawsuit. *Wilson v.*

Parker, Covert & Chidester, 123 Cal.Rptr.2d 19, 22 (2002). Where, as here, a lawsuit has survived one or more demurrers and summary judgment motions - - and has thus been judicially determined under the California law which should have been followed to raise viable claims of law and triable issues of material fact - - such a lawsuit can never be deemed "frivolous" or in "bad faith," absent an explicit determination that the evidence presented at trial substantially conflicted with the pleadings and documentary evidence produced in opposing the motions. Under California law motions for summary judgment are only to be granted if it is determined that there are "no triable issue[s] as to any material fact and that the moving party is entitled to a judgment as a matter of law." Cal. Code Civ. Proc. § 437c(a). Motions for summary judgment as well as oppositions thereto, are to be "supported by affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice shall or may be taken." § 437c(b). Consequently, a cause of action which has survived summary judgment based upon the appropriate evidentiary attachments has been judicially determined to be sound "as a matter of law," to present "triable issues of fact," and thus, to be non-frivolous. *Wilson v. Parker, Covert & Chidester, supra,* 123 Cal.Rptr.2d at 22.

While a trial judge may grant a motion for nonsuit at the close of plaintiff's case where, under the evidence presented, "no possibility exists that a cause of action can be proved,"[6] attorneys may be sanctioned for improperly litigating a

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[6] In ruling on a motion for nonsuit, "[a]n appellate court must resolve every conflict in the evidence in favor of the plaintiff, consider every reasonable inference and every presumption which supports the plaintiff, and accept as true all direct or indirect evidence which tends to sustain the plaintiff's case." *Ayer v. Boyle*, 112 Cal.Rptr. 636, 639-640 (Cal.Ct.App. 1974); see *Carson v. Facilities Development Co.*, 686 P.2d 656, 660 (Cal. 1984).

nonsuited case under Cal.Code Civ. Proc. § 128.5 only if the attorney has engaged in 'bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay."[7]

In the original action below, two different judges expressly determined independently that the lawsuit presented "triable issues of fact," and effectively ruled that the defendants were not "entitled to judgment as a matter of law." (Exh. 15D:649) At no time did the trial court make any judicial determination that the plaintiff's evidence at trial failed to conform to his pretrial pleadings or that the trial testimony materially differed from the pretrial testimony. To the extent that the trial court, the Court of Appeal and the State Bar Court Review Department adopted a view of the legal elements of plaintiff's claims which substantially differed from the views of the motions' judges who denied the summary judgment motions and overruled the demurrer, this only highlighted the unfair, illogical and, at bottom, unconstitutional risks that plaintiff was made to run. Attorneys must surely be able to place some reliance on rulings by motion judges that their pleadings, as supported by evidentiary attachments, were sufficiently sound not only to survive a summary judgment motion, but to avoid being labeled "frivolous" or "bad-faith actions," warranting the imposition of such draconian sanctions. The "risks of error" imposed on petitioner as a result of the glaringly inconsistent and irrational application of California's standards and quanta of proof constituted a flagrant violation of the Due Process Clause.

The California scheme has disturbingly broad implications for an adversarial system such as ours in which

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[7] The term "frivolous" is defined in § 128.5 as meaning "(A) totally and completely without merit or (B) for the sole purpose of harassing an opposing party."

"lawyers [must] be able to make honest, good-faith efforts to present their client's cases." *In re McConnell*, 370 U.S. 230, 236 (1962). "[A]n attorney is not an insurer . . . that his client will win litigation[;] [r]ather, he has a duty to represent his client zealously . . . [by seeking] any lawful objective through legally permissible means . . . [and by presenting] for adjudication any lawful claim, issue, or defense." A.B.A. Code of Professional Responsibility, EC 7-1, DR 7-101(A)(1). "If the issue which the attorney is called upon to decide is fairly debatable, then under his oath of office, he is not only authorized but obligated to present and urge his client's claim upon the court." *Kassan v. Bledsoe*, 60 Cal.Rptr. 799, 803 (Cal.App.Ct. 1967) (citation omitted).

As a consequence of the decision below, attorneys in California will be compelled to second-guess judges and to voluntarily seek dismissal of their own clients' cases if they believe that in spite of surviving one or more pretrial motions, they cannot win the action at trial. That is an outcome which strikes at the very heart of the adversarial system by converting attorneys into judges of their own cases.[8] If they do not, they

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[8] As the California Supreme Court has stated in the leading California case on sanctions: "Counsel face the danger of being trapped between their obligation to their clients to diligently pursue any possibly meritorious claim, and their obligation to the judicial system to refrain from prosecuting frivolous claims. '[An] attorney is often confronted with clashing obligations imposed by our system of justice. An attorney has an obligation not only to protect his client's interests but also to respect the legitimate interests of fellow members of the bar, the judiciary, and the administration of justice.' (Citation) The strong public policy in favor of the peaceful resolution of disputes in the courts requires that attorneys not be deterred from pursuing legal remedies because of a fear of personal liability. To decide otherwise 'would inject undesirable self-protective reservations into the attorney's counselling role,' and prevent counsel from devoting their entire energies to their clients' interests." *In re Marriage of Flaherty*, 183 Cal.Rptr. 508, 514 (1982).

face the possibility of not only debilitating sanctions awards against them, but serious discipline by the State Bar.

Because California's scheme, as construed by its courts, unfairly and irrationally places the risks and consequences of error on plaintiffs' attorneys by allowing for the imposition of highly punitive sanctions and suspension or disbarment upon them even where they have been given a green light by one or more motions' judges, because the lower courts addressing this question have reached different conclusions, and because this case raises a recurring question of great importance to plaintiffs' attorneys throughout the country, certiorari should be granted.

II.

THE DECISION BELOW, BY IMPOSING DISCIPLINE ON PETITIONER OCCASIONED BY THE PUNITIVE SANCTIONS AWARD LEVIED AGAINST HIM WITHOUT INQUIRING INTO THE FACT THAT THE TRIAL COURT DID NOT ACCORD HIM THE RIGHT AND TIME TO RESPOND IN WRITING TO THE CHARGES, THE RIGHT TO CONTEST IN A FULL EVIDENTIARY HEARING THE WORK AND TIME WHICH OPPOSING COUNSELS' DECLARATIONS SET FORTH AND THE RIGHT TO HAVE THE HEARING HELD BEFORE AN UNBIASED JUDGE, VIOLATES THE ATTORNEY'S CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW AND TO A JURY TRIAL.

While courts possess inherent power to regulate conduct within their courts, including assessing counsel fees and levying sanctions in response to genuinely abusive litigation

practices, that power must be "exercised with great caution." *Chambers v. NASCO* 501 U.S. 32, 41 (1991); see also *Link v. Wabash R. Co.* 370 U.S. 626, 630-633 (1962). There are minimal procedural due process requirements which must be met before such fees may be assessed or such sanctions imposed. *Roadway Express, Inc. v. Piper* 447 U.S. 752, 766-767 & n. 14 (1980).

The phrase "due process" expresses the requirement of "fundamental fairness." *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981). Ingrained in our concept of due process is the requirement of notice and an opportunity to be heard. *Lambert v. California* 355 U.S. 225 (1958). That right to a hearing includes the right to produce evidence and to cross-examine adverse witnesses. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). Another essential element of a fair hearing is an impartial judge. *Tumey v. Ohio*, 273 U.S. 510 (1927). A judge cannot be both prosecutor and judge. *In re Murchison*, 349 U.S. 133 (1955).

While this Court has made clear that "attorney's fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record, the Court has never definitively enumerated exactly which basic procedural protections are necessary before substantial punitive attorney sanctions may be imposed. *Roadway Express v. Piper, supra,* 447 U.S. at 767. The federal circuit courts of appeals, in addressing the constitutional requirements for the imposition of attorney sanctions by federal district courts, have differed as to the level of protection necessary. While many circuits have afforded district court judges wide latitude in determining the circumstances under which the various features of an adversarial hearing may be necessary - see *International Shipping Co. v. Hydra Offshore, Inc.*, 875 F.2d 388, 392 (2d Circ.), *cert. denied,* 493 U.S. 1003 (1989); *Alizadeh v. Safeway*

Stores, Inc., 910 F.2d 234, 236-237 (5th Cir. 1990); *Kapco Mfg. Co., Inc. v. C&O Enterprises, Inc.*, 886 F.2d 1485, 1494-1495 (7th Cir. 1989); *Dodd Ins. Services, Inc. v. Royal Ins. Co. of America*, 935 F.2d 1152, 1160 (10th Cir. 1991) - other circuit courts have mandated comparatively extensive procedural protections, especially where the sanctions imposed are punitive. See *Spiller v. Ella Smithers Geriatric Ctr.*, 919 F.2d 339, 346 (5th Cir. 1990). See also *Donaldson v. Clark*, 819 F.2d 1551, 1559-1561 (11th Cir. 1987).

While few of the ingredients of a full-blown evidentiary hearing are necessary in cases where the amount of the sanctions under consideration is small and merely compensatory, where the sanctions are substantial, or as here, punitive, there are, as the Ninth Circuit observed, particularly "compelling reasons" for the provision of more stringent procedural requirements:

> "[T]he attorneys will have an opportunity to prepare a defense and to explain their questionable conduct at a hearing; the judge will have time to consider the severity and propriety of the proposed sanction in light of the attorneys' explanation for their conduct; and the facts supporting the sanction will appear in the record, facilitating appellate review."

Miranda v. Southern Pacific Transp. Co., 710 F.2d 516, 522-523 (9th Cr. 1983). See also *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991) (constitutional due process imposes substantive limits on the size of punitive damage awards); *Honda Motor Co., Ltd. v. Oberg*, 62 U.S.L.W. 4627, 4631 (U.S. Jun. 24, 1994) (No. 93-644); *International Union, United Mine Workers of America v. Bagwell*, 62 U.S. L.W. 4705, 4708 (U.S. Jun. 30, 1994) (No. 92-1625). This is because the imposition of severe or punitive sanctions tends to pose a

"danger of chilling the diligent pursuit of lawsuits by an attorney for his or her client." *Monex International, Ltd. v. Peinado*, 274 Cal.Rptr. 667, 670 (Cal.App.Ct. 1990).

California's statutory regime, while expressly requiring that attorneys subject to sanctions be given "notice and opportunity to be heard," has been construed by the state courts in such a way as to give the lower courts unbridled discretion in deciding exactly which procedural protections are constitutionally necessary in a given case. Although the California Supreme Court in *Lavine v. Hospital of the Good Samaritan*, 215 Cal.Rptr. 708, 714 (Cal.App.Ct. 1985) upheld the constitutionality of § 128.5 on the ground that the statute does not *preclude* a party facing sanctions from subpoenaing witnesses and producing evidence, the statute has been construed in other cases so as not to *require* that courts afford parties these basic procedural protections. See, e.g., *Endler v. Schutzbank*, 436 P.2d 297, 303 (Cal. 1968); *Lesser v. Huntington Harbor Corp.*, 219 Cal.Rptr. 562, 567 (Cal.App.Ct. 1985). Whereas some California courts have been comparatively demanding of judges considering the imposition of sanctions others have been far less exacting. Compare *In re Marriage of Flaherty, supra*, 646 P.2d at 190, *Lesser v. Huntington Harbor Corp., supra*, 219 Cal.Rptr. at 568, with *In re Marriage of Quinlan*, 257 Cal.Rptr. 850, 853 (Cal.App.Ct. 1989). Attorneys in California have thus been left with little basis for predicting what process will be afforded them before a court decides whether to impose sanctions upon them.
Due process is a flexible concept, and must be tailored to the requirements of each particular situation. There is no procedure that is universally applicable to every imaginable situation. *Cafeteria Workers* v. *McElroy* 367 U.S. 886, 895 (1961).

In the instant case, Judge Ross, at the close of petitioner's case, granted defendants' motion for nonsuit and,

sua sponte, ordered that a sanctions hearing be held pursuant to Cal. Code Civ. Proc. § 128.5, without giving any reasons for the hearing. At the hearing, while the judge ultimately allowed petitioner to present legal argument, he expressly refused to allow petitioner to call witnesses or to examine the source of hearsay declarations presented to the court by defendants, stating, "No. That's denied. You are supposed to do it by declarations, counsel. I'm not going to violate every rule of court for you." (Exh. 15H:961-962) Petitioner meticulously objected to the judge's procedures, asserting his constitutional rights to due process and to a jury trial. (Exh. 15H:943-944) The judge nonetheless imposed $218,299.10 in sanctions on him. The judge's conduct of the hearing thus violated petitioner's due process right to an evidentiary hearing. Given the exorbitant and highly punitive nature of the sanctions imposed, the defendant's right to a jury trial under the terms of the Seventh and Fourteenth Amendments, was also violated. See *International Union, United Mine Workers of America v. Bagwell, supra*, 62 U.S. L. W. at 4708.[9]

Given the increasing frequency with which sanctions are imposed, given the disparate constitutional treatment among the courts, and given the potential chill on zealous advocacy cast by the imposition of exorbitant, if not punitive, attorney sanctions, this Court's guidance is needed to contain the unconstitutionally broad discretion permitted judges under

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[9] Cal.Code Civ. Proc. § 128.5, in general allows only for the imposition of "reasonable expenses, including attorney's fees," and, except in circumstances not applicable here, does not permit the imposition of "punitive" sanctions. Because petitioner was barred by the judge from examining members of the Krissman firm and their defense counsel in order to determine how their fees and expenses were arrived at, he was effectively precluded from establishing that the sanctions amount was not merely compensatory, as provided for in § 128.5, but was effectively punitive.

schemes such as California's. This Court should thus grant certiorari in order to resolve the growing split amongst the circuit courts and amongst the state courts, and to provide much needed uniformity in this most critical area of the law.

III.

SECTION 6068, SUBDIVISIONS (c) AND (g), OF THE CALIFORNIA BUSINESS AND PROFESSIONS CODE IS UNCONSTITUTIONAL AS VAGUE AND OVERBROAD BECAUSE THE STANDARDS BY WHICH ATTORNEYS MUST MEASURE THEIR CONDUCT ARE UNDEFINED AND SUBJECTIVE.

Although Scott was originally charged by the State Bar with violation of these two parts of section 6068 and of section 6061 as well, the final judgment of the State Bar Court and its Review Department found him culpable only under subdivisions (c) and (g). (A. 1) Those two subdivisions deal with one of the "most precious of the liberties safeguarded by the Bill of Rights," the right to petition for a redress of grievances, which is "intimately connected" with the rights of free speech and free press. *United Mine Workers v. Illinois State Bar Ass'n.*, 389 U.S. 217, 221 (1967).

In order to find Scott in violation of (c) the court had to find that he, in fact, maintained actions which *he* did not find "legal" or "just" and that he had a "corrupt motive of passion or interest." The terms "legal" and "just" as used in section 6068 are not defined and leave attorneys guessing at their meaning, which depends on a subjective assessment by the one defining them. Hence the accused attorney is not given fair warning in language that a person of reasonable intelligence can understand as to what the law requires of an action to ensure that it is "legal" and "just."

The lead-in language of "such as appear to him" is also subjective and vague, since it requires an inquiry into the attorney's state of mind, which may well differ from time to time and from case to case, and from attorney to attorney. Speech and action by attorneys on matters of legal representation is accorded the strongest protection our Constitution has to offer Inhibiting or punishing that speech or action can destroy an attorney's reputation and the enjoyment of one's good name and reputation has been recognized repeatedly as being among the most cherished of rights enjoyed by a free people, falling within the concept of personal liberty. *Zauderer v. Office of Disciplinary Control of Supreme Court*, 471 U.S. 626, 670 (1985) ("*Zauderer*".)

The first task of a court is to determine if the enactment reaches a substantial amount of constitutionally protected conduct, and if it does, then a stringent vagueness test must apply. *United States v. Wunsch*, 84 F.3d 1110, 1119 (1996) (holding unconstitutional subdivision (f) of section 6068 of the California Business and Professions Code). A hypothetical ban on all "actions, proceedings or defenses" that do not "appear to him. . . legal or just" forbids speech and actions in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, making it presumptively unconstitutional. *Zauderer, supra,* 471 U.S. at 665. The words in the statute are chillingly similar to an ordinance that made it a criminal offense for "three or more persons to assemble. . .on any of the sidewalks . . . and there conduct themselves in a manner annoying to persons passing by," held void on its face and unconstitutionally broad in punishing protected conduct. *Coates v. Cincinnati*, 402 U.S. 611 (1971). Thus the overbreadth doctrine applies if an enactment prohibits a substantial amount of constitutionally protected conduct, here, the First Amendment right to freely petition to right a perceived wrong. The prohibition in section 6068 is far broader than necessary to protect defendants'

interests in the disciplinary system.

Scott believed that every action he took was both "legal" and "just" because every client has a constitutional right under the petition clause to vigorously advocate his client's interests with respect and moderation. The fact that Scott, an attorney, was, himself, the client, should not give rise to a different standard nor be applied in a different way. A state should not be able to hold discipline as a stick over an attorney's head for doing what he could do for a non-attorney client. That double standard cannot help but have a chilling effect on all plaintiffs' counsel. No judge except Judge Ross - whose objectivity must be questioned in light of his relationship with the defense firm - found Scott to be a vexatious litigant or to have violated any rules of conduct or have abused legal process in any way, and for that the State Bar disciplined him. Indeed, in the original lawsuit, three judges had found Scott had good cause, in overruling first a demurrer and then two summary judgment motions brought by the defense. The guarantees of the right to petition and the right to have clear and understandable laws that regulate conduct apply just as fully to attorneys as to non-attorneys. *Zauderer, supra*, 471 U.S. at 666. Even given that there is some room for enforcement of standards involving attorneys that might be impermissibly vague in other contexts, where an attorney may be properly punished for "conduct which all responsible attorneys would recognize as improper for a member of the profession. . . [citation], where the appraisal of an attorney's conduct is one about which reasonable men differ, and where the state has not proscribed the conduct in reasonably clear terms, the Due Process Clause forbids punishment of the attorney for that conduct. [Citation]" *Id.*

Incorporating all of the above, the prohibition against commencing or pursuing any action for any "corrupt motive or interest" is equally vague. It is not defined anyplace and gives

no guidance as to the difference between what is simply zealous advocacy and what is "corrupt," nor does it explain what circumstances will demonstrate that corruption. So also one is unable to define what is required to show "encouragement" of the subject lawsuit. Such a ban would presumably prevent an attorney from bringing an action for an improper motive even though the claim or defense was based on sound legal reasoning and probable cause. Like subdivision (c), subdivision (g) appears to distinguish favored from disfavored court speech on the basis of the ideas or views expressed. Hence the statute is impermissibly content-based and violates the petition clause of the First Amendment.

Neither subdivision furthers an important or substantial governmental interest unrelated to the suppression of expression, and the resulting limitation on protected court speech is greater than necessary or essential to the protection of the governmental interest in disciplining lawyers for the protection of the public. Because of the vagueness and overbreadth of the subdivisions, clients are subject to being harmed because of the overcautious approach taken by their attorneys who are fearful of being disciplined.

Statutes such as the (c) and (g) sections of 6068, which by their terms distinguish favored from disfavored court speech on the basis of the ideas or views expressed, are content-based and thus infringe on speech and petition rights protected by the First Amendment. The Due Process Clause protects civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428-430 (1982). The vital purpose of the constitution is undermined when a litigant who, in good faith, files a claim or defense invoking the statutory provisions for redress of grievances by the filing of a law suit, may have his protected right burdened by a statute subjecting him to discipline.

Even California law, had it been followed, does not allow for such results. "The act of an attorney which reasonably may be reconciled with the pursuit of a legal remedy invoked under a misconception of rights may not be characterized as one of those denounced by the statute." *Sullivan v. State Bar of California*, 170 P.2d 888, 892 (1946).[10] As the California Supreme Court noted in *Sullivan*, even if the conduct may fall below that of "an ethical lawyer endeavoring to uphold the high principles of an honorable profession," it is not always cause of suspension or disbarment, because the act complained of must come *clearly* within the conduct barred by the Legislature. *Id.*

Thus the statutory scheme under which Scott was disciplined should be found to be unconstitutional.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner

Dated: October 13, 2003.

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[10] *Sullivan* was overruled on other grounds by *Stratmore v. State Bar of California*, 123 Cal.Rptr. 101 (1975).

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PUBLIC MATTER - DESIGNATED FOR PUBLICATION

REVIEW DEPARTMENT OF THE STATE BAR COURT

FILED
OCT 25 2002
STATE BAR COURT
CLERKS OFFICE
LOS ANGELES

In the Matter of	)	94-0-17860
CAREY BRENT SCOTT,	)	**OPINION ON REVIEW**
A Member of the State Bar.	)	

Both the State Bar of California (State Bar) and respondent Carey Brent Scott seek review of a hearing judge's decision finding respondent culpable of filing a frivolous lawsuit in bad faith and for a corrupt motive. The hearing judge recommended that respondent be suspended from the practice of law for two years, that execution of the suspension be stayed, and that he be placed on probation for two years on conditions, including 60 days' actual suspension.

Respondent filed and pursued a series of four related lawsuits. After each action was resolved unfavorably to respondent, he filed the next. The hearing judge found that respondent was not culpable with respect to the first three actions, but had "crossed the line" with respect to the filing of the fourth matter and therefore was culpable. On review, the State Bar asserts that respondent should be found culpable for filing and pursuing the first of the four lawsuits as well. The State Bar does not seek an increase in the recommended discipline. Respondent argues on review that he is not culpable of any misconduct with respect to any of the four lawsuits, but that if he is culpable the discipline should be reduced to a

reproval at most.

We have independently reviewed the record in this proceeding and conclude that the hearing judge's factual findings are supported by the record, and we adopt them with the modifications noted below. The notice of disciplinary charges alleges that respondent is culpable of single violations of Business and Professions Code section 6068, subdivisions (c) and (g) and section 6106 as a result of his conduct in filing and pursuing the four lawsuits as a whole.[1] It does not charge four separate violations of each of these statutes. Viewed from this perspective, we conclude that the record clearly and convincingly demonstrates that respondent is culpable of filing and pursuing frivolous actions in bad faith and for a corrupt motive. Although we modify slightly the hearing judge's culpability conclusions, we find that the discipline recommendation is appropriate based on the record as a whole.

FINDINGS OF FACT AND CONCLUSIONS OF LAW[2]

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[1] All further references to sections are to the Business and Professions Code unless otherwise noted. Section 6068, subdivision (c) provides that an attorney has a duty to maintain or counsel only such proceedings, actions, or defenses which appear just or legal. Section 6068, subdivision (g) provides that an attorney has a duty "[not to encourage.either the commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest." Section 6106 provides that the commission of any act involving moral turpitude, dishonesty, or corruption constitutes a cause for suspension or disbarment.

[2] Although we have adopted the hearing judge's factual findings, we set forth here only those findings relevant to our disposition. In addition, we have added factual findings that we conclude are clearly and convincingly established based on our independent review of the record.

James Cooke, a pipe fitter, was severely injured in an explosion at his workplace in October 1988. Cooke's wife, Ann, employed respondent to represent Cooke in the personal injury and worker's compensation cases arising from the accident. Although Cooke did not sign the retainer agreement, he orally approved of respondent representing him and fully ratified that representation.

Thereafter, Allen Jones, business manager of Cooke's union, became concerned that respondent was not properly representing Cooke. In February 1989, during a dinner seminar conducted by the law firm of Silver, McWilliams, Stolpman, Mandel & Katzman (Silver firm), Jones met attorney Krissman, a partner in the Silver firm. A few days later, Jones called Krissman and asked him to check respondent's credentials. Krissman researched respondent in Martindale-Hubbell and O'Brien's Evaluator and found neither an ability rating for respondent nor evidence that he had conducted any jury trials. Krissman informed Jones of the results of his research and informed him that none of his partners at the Silver firm had ever heard of respondent.

Jones called Cooke and informed Cooke of his concern about respondent's handling of Cooke's case and of his conversation with Krissman. Jones also told Cooke that he would arrange to have a lawyer call Cooke. Jones then informed Krissman that Cooke was interested in a second opinion, gave Krissman Cooke's telephone number, and asked Krissman to call Cooke to "render a second opinion" regarding Cooke's case.

In February 1989, Krissman called Cooke, confirming that he was calling at the behest of Jones to give Cooke a second opinion about his case. Krissman told Cooke about the Silver firm's experience in handling industrial accident cases, that respondent had never before handled a case as big as

Cooke's, and that he could do a better job. Krissman's conversation with Cooke lasted approximately 15-20 minutes and resulted in an appointment for a meeting at Krisssman's office three days later.

After Krissman's telephone call, the Cookes were briefly concerned about whether ffiey had employed a qualified attorney by hiring respondent. Cooke called respondent the next day and informed him of the conversations with Jones and Krissman. Cooke told respondent that Krissman told him that respondent had never had a case that size and that Krissman claimed he could do a better job than respondent. However, Cooke assured respondent that he was "totally and completely satisfied" with respondent's representation, that he had complete confidence in respondent, that he (Cooke) knew before he hung up the phone with Krissman that he (Cooke) was not going to go to the meeting, and that he had no intention of changing attorneys. Nevertheless, at the end of their conversation respondent was uncertain whether Cooke would use another lawyer's services and did not know whether the appointment with Krissman would be cancelled. Respondent, however, believed he had convinced Cooke not to go to Krissman' 5 appointment.

Mad and "extremely upset," respondent called Jones the next day. Jones relayed to respondent his concerns about the way respondent was handling Cooke's case. Respondent then called the Silver firm that same day but was unable to speak to Krissman. Two days later, fearing that Cooke would not continue to employ him as Cooke's attorney and not having heard from Krissman, respondent filed a lawsuit in the superior court against Krissman and the Silver firm for intentional interference with contract, for allegedly interfering with respondent's retainer agreement with Cooke, and for disparagement and defamation, for allegedly publishing to Jones and Cooke false statements that defamed respondent's

legal reputation (lawsuit #1). Respondent arranged to have the complaint served on Krissman at the time of Cooke's scheduled appointment with Krissman. Cooke did not meet with Krissman.

Concerned that Cooke might leave him, respondent hired his wife to work in his law firm so that he could devote more attention to the Cooke case. Respondent and his wife also began socializing with the Cookes and went with them to Hawaii and on camping trips. Respondent also began to encourage Cooke to attend other trials that respondent was litigating and to participate in each step of his own case.

In November 1991, respondent settled Cooke's civil case for $5.2 million. Respondent received over $1.6 million in legal fees from the settlement.

Respondent knew prior to filing lawsuit #1 that Jones had asked Krissman to call Cooke. Respondent filed lawsuit #1 for several reasons: "To put a stop to the practices of [the Silver firm's] and Mr. Krissman's actions;" to get the attention of the defendants; for a $150 filing fee, respondent could "prioritize [the defendants'] calendar;" to recover "the damages that were caused to my reputation and my law firm;" and to teach a lesson to the defendants. Respondent also filed lawsuit #1 because he had no explanation from Krissman for his actions as he had not received a follow-up call from Krissman.

In April 1991, respondent offered to settle with the defendants for $5,867, the amount of respondent's costs up to that point in time. The offer was not accepted. The defendants' motion for summary judgment in April 1991 was denied.

Lawsuit #1 was tried before a jury in January 1992. At the close of respondent's case-in-chief after six days of trial, the

trial court granted a judgment of nonsuit in favor of Krissman and the Silver firm. The court, on its own motion, ordered a Code of Civil Procedure section 128.5 sanctions hearing. The hearing was held in February 1992, and the court awarded sanctions against respondent in the amount of $218,299 for having filed and pursued a frivolous lawsuit in bad faith.

After the sanctions were awarded on the record at the hearing but before the written order was signed, respondent moved to dis qualify the trial judge, Honorable James R. Ross. The grounds for the motion were, inter alia, that Judge Ross was biased against respondent due to his strong personal and professional relationship with the Silver firm in that Judge Ross knew several firm attorneys and had attended dinner parties sponsored by the firm and that Judge Ross was indebted to one of the named partners, Stolpman, because Stolpman had assisted Judge Ross in getting his judicial appointment Respondent also asserted that Judge Ross's bias was evidenced by his comments and questions to the witnesses and demeanor towards respondent during the trial and his erroneous rulings in the case, including the granting of the nonsuit and sanctions. The motion was denied as respondent had failed to prove any disqualifying relationship and the remaining contentions were grounds to be pursued on direct appeal. Respondent's petition for a writ Qf mandamus was denied by the Court of Appeal, and review was denied by the California Supreme Court.

Respondent appealed the judgment and sanctions award in lawsuit #1. In an unpublished opinion filed in December 1993, the Court of Appeal affirmed both the nonsuit and sanctions award. The Court concluded that the intentional interference with contract claim failed for several reasons. First, there was no evidence of intentional or unjustified acts by Krissman intended to disrupt the contractual relationship as: Jones asked Krissman to call Cooke, Jones contacted Cooke

and suggested he speak to Krissman, and Cooke agreed and told Jones to have Krissman call him. Next, there was absolutely no disruption of Cooke's contract with respondent as: Cooke was completely satisfied with respondent and told him so, Cooke had some doubts about respondent's abilities for one day at most, and there was no evidence that Cooke ever had any intention of finding another lawyer. Finally, respondent was not damaged as spending money to cement his relationship with Cooke was simply not legal damage.

The Court of Appeal also concluded that there was no defamation or disparagement shown. Cooke never understood the statements to be defamatory, and respondent's reputation in the community was not damaged as the statements were not made to anyone other than Jones and Cooke and the uncontroverted evidence showed that respondent enjoyed great success as a lawyer and had a good reputation. Further, Krissman's statements were subject to a qualified privilege as he was providing a legally permissible second opinion to Cooke, and there was no evidence that Krissman's statements were motivated by hatred or ill will and therefore respondent failed to show actual malice sufficient to overcome that privilege.

Finally, the Court of Appeal concluded that no abuse of discretion was shown with regard to the sanctions award. The evidence supported the trial court's conclusion that respondent's action was meritless and brought in bad faith as respondent did not file the lawsuit to recover damages but to teach the defendants a lesson, and it was apparent that before the lawsuit was filed, not to mention before trial, respondent knew that his relationship with Cooke had not been disrupted and that he had not been defamed. Further, the Court rejected respondent's argument that there was insufficient evidence presented to support the amount of the award. Respondent unsuccessfully sought a rehearing in the Court of Appeal and review by the

California Supreme Court and United States Supreme Court.

In August 1994, respondent filed a second petition for a writ of mandate with the Court of Appeal seeking to set aside the judgment and sanctions in lawsuit #1 on the grounds that newly discovered evidence showed that Judge Ross was prejudiced against respondent. The alleged new evidence was that Ross avoided service of respondent's motion to disqualify him until after Ross had signed the sanctions order; that telephone records showed six calls from Judge Ross's courtroom to the Silver firm in January and February 1992; and that Judge Ross had an undisclosed professional relationship with the Silver firm attorneys in that they had all been active members of the Los Angeles Trial Lawyers Association (LATLA) for 15 years. Respondent's petition was denied, and review by the California Supreme Court was denied.

In January 1995, respondent filed a civil rights action in the United States District Court against Judge Ross, Krissman, Stolpman, and Robert Baker (defense counsel in lawsuit #1), alleging in one cause of action that Judge Ross violated his civil rights and in a second cause of action that the remaining defendants conspired to violate his civil rights (lawsuit #2). Respondent asserted, inter alia, that Judge Ross was a biased decision maker due to his close personal and professional relationship with Stolpman and Baker in that they were personal friends and had all been members of LATLA, that Judge Ross attended several private parties hosted by Baker, and that numerous telephone calls were made from Judge Ross's courtroom to Baker's law office both before and during the trial of lawsuit #1; that Judge Ross's bias was evidenced by his conduct during the trial of lawsuit #1 and by his legally erroneous rulings in the case in that Judge Ross became an advocate for the defendants in lawsuit #1 and awarded the sanctions without sufficient evidence; and that Judge Ross and

the other defendants entered into a conspiracy to violate his civil rights by, inter alia, improper ex parte communications and agreeing beforehand to produce a verdict against respondent in lawsuit #1 for financial and professional gain.

Motions to dismiss by the defendants for, inter alia, failure to state a claim upon which relief could be granted were denied by the district court. Judge Ross filed a motion for summary judgment or for judgment on the pleadings. Judge Ross's motion was granted on collateral estoppel grounds in that the issues raised against him regarding the alleged personal and professional relationship were the same as the issues raised in the state court motion to disqualify Judge Ross and were decided against respondent on the merits and that the remaining issues were decided against respondent on the merits by the Court of Appeal opinion in lawsuit #1. Judgment was entered in favor of Judge Ross and against respondent in July 1995.

In August 1995, the district court, sua sponte, issued an Order to Show Cause as to why lawsuit #2 should not be dismissed for lack of subject matter jurisdiction based on a then-recent decision of the Ninth Circuit. In September 1995, the district court dismissed lawsuit #2 as to all defendants for lack of subject matter jurisdiction and vacated the judgment in favor of Judge Ross as well as the order granting his summary judgment motion. No appeal was filed.

In September 1995, respondent filed a complaint for equitable relief against Krissman and the Silver firm in the superior court (lawsuit #3) seeking to set aside the judgment and sanctions award in lawsuit #1. The complaint alleged that Judge Ross, Baker and the defendants, Krissman, the Silver firm, and members of that firm, concealed material facts and procured the judgment and sanctions in lawsuit #1 by extrinsic fraud. The factual allegations were substantially the same as the

factual allegations in lawsuit #2 and included that Judge Ross had a close personal and professional relationship with Stolpman and Krissman and that all three had been members of LATLA; that Judge Ross attended parties hosted by Baker; that numerous telephone calls were made from Judge Ross's courtroom to Baker's law office during the pendency of lawsuit #1; that Judge Ross avoided service of the motion to disqualify him in lawsuit #1; and that Judge Ross assumed a partisan role and made legally erroneous rulings in lawsuit #1.

The defendants' demurrer in lawsuit #3 was overruled. Thereafter, the defendants filed a motion for summary judgment which was also denied. In denying that motion, the court noted the following triable issues of disputed fact: (1) whether Judge Ross had personal or professional relationships with Baker, Stolpman, and/or Krissman which should have been disclosed but were not and the impact of those facts, if any, on the decisions made by Judge Ross in lawsuit #1; (2) whether Judge Ross had a private telephone line in his chambers or court which was utilized for ex parte communications with Krissman, Stolpman or Baker; and (3) the number and extent of telephone calls or contacts between Judge Ross and Krissman, Stolpman or Baker during the pendency of lawsuit #1. The defendants' petition for a writ of mandate was denied.

A bench trial was held in lawsuit #3 in October 1996. At the close of respondent's case-in-chief following the extensive testimony of 10 witnesses and 58 exhibits, the trial court entered judgment against respondent under Code of Civil Procedure section 631.8. The court held that respondent failed to prove who made any of the telephone calls; that there was no evidence of a close personal relationship between Judge Ross and the other attorneys; and that there was no evidence that Judge Ross had any kind of bias or prejudice against respondent. The court also commented on the merits of lawsuit

#1, stating "I really sincerely feel that anyone who heard the case, any judge who heard the case would have granted the non-suit." Lawsuit #3 was dismissed, but no sanctions were ordered against respondent. No appeal was filed.

One week after the dismissal, respondent filed an action against Baker and Judge Ross in superior court (lawsuit #4), alleging civil rights violations and defamation against Judge Ross and fraudulent billing by Baker. The lawsuit alleged that respondent's civil rights were violated because Judge Ross was biased and prejudiced against him. The factual allegations supporting this charge were virtually identical to the factual allegations contained in lawsuits #2 and #3, and included that Judge Ross had a close personal and professional relationship with Stolpman and Baker and that Ross,.Baker, and Stolpman had all been members of LATLA; that Judge Ross attended parties hosted by Baker; that numerous telephone cafls were made from Judge Ross's courtroom to Baker's law office during the pendency of lawsuit #1; that Judge Ross avoided service of the motion to disqualify him in lawsuit #1; and that Judge Ross assumed a partisan role and made erroneous rulings in lawsuit #1.

The defamation cause of action against Judge Ross alleged that after he retired from the bench in July 1995, Judge Ross told several other judges in the judges' lunchroom in the courthouse, "I've got another lawsuit by C. Brent Scott," to which the other judges replied, "Oh, my god, no. Him again," to which Ross replied, "Yeah, He'll never quit; same allegations." The complaint also alleged that Judge Ross sent written communications to several judges regarding Judge Ross's defense of charges brought by respondent with the Commission of Judicial Performance, which communications allegedly "blamed" respondent for the attorney's fees Judge Ross had incurred in defending the Commission action. The fraud cause of action against Baker alleged that Baker had

submitted false billings to Judge Ross in support of the sanctions motion in lawsuit #1.

The defendants' demurrers to the complaint in lawsuit #4 were granted without leave to amend in February 1997. The court ruled that the first cause of action against Judge Ross for violating respondent's civil rights was barred pursuant to the doctrines of collateral estoppel and judicial immunity; that the second cause of action for defamation against Judge Ross was barred as all statements allegedly made by Judge Ross were mere opinion; and that the third cause of action alleging fraud against Baker was barred based on the statute of limitations and the doctrine of collateral estoppel. Stolpman's motion for sanctions against respondent was denied. No appeal was filed.

The defendants in lawsuit #1 recovered approximately $130,000 of the $218,299 sanctions ordered in that case by way of a levy on a bank account in which respondent had an interest. The remainder has apparently been discharged as a result of respondent's bankruptcy.

As indicated above, the notice of disciplinary charges alleges that respondent violated sections 6068, subdivisions (c) and (g), and 6106 as a result of the above conduct. With respect to lawsuit #1, the hearing judge determined that although respondent had some improper motives in filing lawsuit #1, such as to teach the defendants a lesson, he also had an honest and reasonable belief that Krissman and the Silver firm were attempting to solicit the Cooke case away from him and his firm; that Krissman and the Silver firm might be attempting to obtain for their own financial gain the biggest case of respondent's career; and that Krissman had defamed the reputations of respondent and his law firm. The hearing judge concluded that respondent had an honest and reasonable belief that the causes of action alleged in lawsuit #1 were well-

founded and viable and that the State Bar had therefore failed to prove by clear and convincing evidence that by filing lawsuit #1 respondent violated any of the charged statutory provisions.

With respect to lawsuit #2, the hearing judge noted that the facts alleged in lawsuit #2 regarding the conspiracy by Judge Ross and attorney Baker were not alleged in lawsuit #1, that initial motions to dismiss by the defendants were denied, and that lawsuit #2 was dismissed and not decided on its merits. The hearing judge concluded that respondent was therefore not culpable of violating any of the charged statutes in filing and pursuing this lawsuit.

With respect to lawsuit #3, the hearing judge concluded that respondent was not culpable as the State Bar failed to prove by clear and convincing evidence that respondent lacked good faith in filing lawsuit #3 in state court after lawsuit #2 was dismissed and not decided on the merits in federal court.

With respect to lawsuit #4, the hearing judge determined that by filing and pursuing lawsuit #4 against Judge Ross and attorney Baker, respondent "crossed the line" and "reached the point that he was engaging in an obsessive pattern of conduct, the sole purpose of which was designed to harass and to be vindictive" towards those he considered responsible for the judgment and sanctions in lawsuit #1. The hearing judge concluded that the claims raised by respondent in lawsuit #4 had "essentially been raised and litigated in lawsuit #3 and/or were not meritorious or just" and that respondent therefore violated section 6068, subdivisions (c) and (g) by filing lawsuit #4. Furthermore, the hearing judge concluded that respondent either intentionally, recklessly, or with gross negligence filed lawsuit #4, a frivolous action, and was therefore culpable of an act of moral turpitude in violation of section 6106.

In mitigation, the hearing judge found that respondent had no prior record of discipline in eight years of practice before the misconduct and three years after the misconduct and before the State Bar trial. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1 .2(e)(i).)[3] Respondent presented evidence of his good character and community service. However, the hearing judge gave little weight to the good character evidence as other evidence indicated that respondent was "impulsive, revengeful, arrogant, and lack[ed] responsibility," and the character witnesses were not aware of the full extent of respondent's misconduct.

In aggravation, the hearing judge found that respondent's misconduct significantly harmed Judge Ross, Baker and the administration of justice (std. 1 .2(b)(iv)); that respondent demonstrated indifference to the consequences of his misconduct and had shown no remorse or recognition of his wrongdoing (std. 1.2(b)(v)); and that respondent's testimony in the State Bar proceeding lacked candor and credibility (std. 1 .2(b)(vi)).

DISCUSSION

As indicated above, both the State Bar and respondent have sought review of the hearing judge's decision. The State Bar agrees with the hearing judge's culpability conclusions regarding lawsuit #4, but argues that we should also find respondent culpable for filing and pursuing lawsuit #1. Respondent agrees with the hearing judge that he is not culpable with respect to the first three lawsuits, but asserts that he engaged in no impropriety in filing and pursuing the fourth.

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[3] All further references to standards are to these standards unless otherwise noted.

The three-count notice of disciplinary charges in this case charges in the first cause of action that respondent's conduct in filing and pursuing all four lawsuits and the related actions was a violation of section 6106. The second cause of action charges that by filing and pursuing all four lawsuits and the related actions, respondent repeatedly filed lawsuits, motions, and petitions which were unfounded in violation of section 6068, subdivision (c). The third cause of action charges that in filing and pursuing all four lawsuits and the related actions respondent acted in bad faith, out of spite, with a retaliatory motive, and with the purpose to harm others and cause delay in the judicial process in violation of section 6068, subdivision (g).

In reaching his culpability conclusions, the hearing judge examined respondent's conduct in each of the lawsuits separately. The parties have done the same in their initial briefs on review. As a result of the manner in which the misconduct was charged, we conclude that the issue to be determined is whether respondent's conduct in filing and pursuing the four lawsuits and related actions as a whole violated the specified statutory provisions. We gave the parties an opportunity to file supplemental briefs addressing this issue. In its supplemental brief the State Bar takes the position that the determination of culpability should be made from respondent's entire course of conduct. In his supplemental brief, respondent argues that his four lawsuits must be individually evaluated and, even if respondent's actions are considered in the aggregate, they do not constitute a violation of the charged statutes.

At the outset we note, as did the hearing judge, the general rule that a civil verdict and judgment have "no disciplinary significance apart from the underlying facts." (*Maltaman v. State Bar* (1987) 43 Cal.3d 924, 947.) Nevertheless, civil findings made under a preponderance of the evidence test are entitled to a strong presumption of validity in

disciplinary proceedings if they are supported by substantial evidence. (*Ibid.*)

The trial judge in lawsuit #1 found that respondent knew prior to filing that lawsuit that he had not been defamed, that his law firm had not been disparaged, and that his retainer contract with the Cookes had not been interfered with at all. These findings are supported by substantial evidence in the record before us. The allegedly defamatory statements were made to Cooke and Jones only. Cooke did not understand the statements to be defamatory and told respondent prior to lawsuit #1 being filed that he was completely happy with respondent and had no intentions of changing lawyers. Further, there was simply no evidence showing that respondent's reputation in the community, or that of his firm, was damaged as a result of the statements. The hearing judge's conclusion that respondent filed lawsuit #1 based on his honest and reasonable belief in its validity is contrary to these civil findings and does not appear to have accorded the civil findings the strong presumption of validity to which they were entitled.[4] Nevertheless, the hearing judge's conclusions with respect to lawsuit #1 focused entirely on the propriety of the filing of that lawsuit. By their express language both section 6068 subdivisions (c) and (g) apply not only to the filing of an action or proceeding, but to the continuation of that proceeding in violation of the subdivisions.

By the time of the trial in lawsuit #1 respondent had settled Cooke's case for $5.2 million and received over $1.6 million in legal fees. Absolutely no evidence was presented at

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[4] The State Bar asserts that "once that strong presumption of validity is established, the burden shifts to the respondent attorney to rebut the presumption." The State Bar cites no authority for the proposition and we are aware of none. As in any discipline case, the State Bar bears the burden of proving culpability by clear and convincing evidence. (*Arden v. State Bar* (1987) 43 Cal.3d 713, 725.)

that trial showing that Cooke ever had any intention of changing lawyers. Absolutely no evidence was presented showing that respondent's or his firm's reputation in the community had been damaged. In fact, it is clear from respondent's and his wife's testimony in lawsuit #1 that his legal business was flourishing throughout this time. The only evidence respondent presented even remotely pertaining to damages related to the interference with contract cause of action and showed that he hired his wife to work in his firm and spent time and money to cement his relationship with the Cookes. As the Court of Appeal held, this "simply cannot be considered legal damage."

Respondent knew before filing lawsuit #1, not to mention before the trial of that action, that the controversy involved a single 15-20 minute conversation between Krissman and respondent's client which was initiated by Krissman at the behest of Jones and which had not caused respondent any harm. He had the lawsuit served on Krissman at the same time as Cooke's scheduled appointment. Without ever serving any written discovery on the Silver firm, respondent noticed and deposed all of the partners of the firm at a location that was a two-hour drive from the Silver firm. None of the deponents had any knowledge of the telephone call. Respondent did not believe that Cooke was going to change lawyers, but, none the less, continued the action.

In short, respondent suffered absolutely no damages as a result of the telephone conversations between Krissman and Jones and between Krissman and Cooke. Yet, he doggedly pursued the case through a several-day jury trial to its unsurprisingly unsuccessful completion. Clearly, respondent selected a means of redress that was out of all proportion to what can only be characterized as a minor and rather innocuous incident. This is strong circumstantial evidence showing that in

pursuing lawsuit #1 respondent was motivated in large measure by spite and vindictiveness.

Respondent's dogged pursuit of questionable claims continued following the sanctions award. In his motion to disqualify Judge Ross, respondent asserted that Judge Ross was biased against him due to his strong personal and professional relationship with the Silver firm in that Judge Ross knew several firm attorneys and had attended dinner parties sponsored by the firm and in that Judge Ross was indebted to Stolpman because Stolpman had assisted Judge Ross in getting his judicial appointment. Respondent also asserted that Judge Ross's bias was evidenced by his comments and questions to the witnesses and demeanor towards respondent during the trial and his erroneous rulings in the case, including the granting of the nonsuit and sanctions. The motion was denied as respondent had failed to prove any disqualifying relationship and the remaining contentions were grounds to be pursued on direct appeal.

In his direct appeal of lawsuit #1, respondent contended that Judge Ross made erroneous rulings in the case and that the motion to disqualify was wrongly decided. The Court of Appeal found no merit to the former and did not review the disqualification ruling as it was reviewable only by mandamus.

In respondent's second mandamus petition he again asserted that Judge Ross was biased against him based on newly discovered evidence showing that Ross avoided service of respondent's motion to disqualify him until after Ross had signed the sanctions order; that telephone records showed six calls from Judge Ross's courtroom to the Silver firm in January and February 1992; and that Judge Ross had an undisclosed professional relationship with the Silver firm attorneys in that they had all been active members of LATLA for 15 years. The second petition was denied.

Respondent again raised the issue of Judge Ross's alleged bias in lawsuit #2. There he alleged that Judge Ross's bias was evidenced by his strong personal relationship with the Silver firm attorneys, by telephone calls between Judge Ross's courtroom and the Silver firm, by his erroneous rulings made in lawsuit #1, by Judge Ross's conduct during the trial of lawsuit #1, and by his award of sanctions based on insufficient evidence. The trial judge in lawsuit #2 granted Judge Ross's summary judgment motion on collateral estoppel grounds, concluding that the issues raised against Judge Ross regarding the alleged personal and professional relationship were the same as the issues raised in the state court motion to disqualify Judge Ross and were decided against respondent on the merits, and the remaining issues were decided against respondent on the merits by the Court of Appeal's opinion in lawsuit #1. We recognize that the district court ultimately dismissed lawsuit #2 and vacated the summary judgment order. Nevertheless, the summary judgment ruling should have caused respondent to reconsider the merits of his claims.

Undeterred, respondent asserted virtually identical claims regarding Judge Ross's alleged bias in his complaint for equitable relief in lawsuit #3.[5] Respondent was given a full opportunity at the trial of this lawsuit to present any and all evidence he had to prove his claims regarding Judge Ross's bias. He was not able to do so. He failed to prove who made any of the telephone calls; he failed to prove that there was a close personal relationship between Judge Ross and the other attorneys; and he failed to prove that Judge Ross had any kind of bias or prejudice against respondent. Respondent's lawsuit was dismissed and he did not appeal.

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[5] Even though Judge Ross was not named in lawsuit #3, the allegations of his misconduct were substantially identical to those in lawsuit #2.

One week after the dismissal respondent filed lawsuit #4, alleging in part that his civil rights were violated because Judge Ross was biased and prejudiced against him. The factual allegations supporting this charge were virtually identical to the factual allegations contained in lawsuit #2 and were the very same allegations that he was unable to prove following a full evidentiary trial in lawsuit #3.

In arguing on review that he is not culpable of any misconduct with respect to lawsuit #4 respondent asserts that the trial court's dismissal of lawsuit #4 was legally and factually erroneous as the doctrine of collateral estoppel could not have applied because he had sued Judge Ross for civil rights violations only in lawsuit #2 and that action was not decided on the merits of that claim. We first note that respondent did not appeal the dismissal of lawsuit #4 and therefore cannot now assert that the dismissal was in error. (8 Witkin, Cal. Procedure (4th ed. 1997) Attack on Judgment in Trial Court, § 6, pp.513-514 [collateral attack not available to challenge non jurisdictional error].) In any event, respondent's argument misses the point. The factual allegations in support of the civil rights cause of action in lawsuit #4 were the same factual allegations that respondent had made repeatedly against Judge Ross in the prior litigations. Respondent had failed to prove those allegations time and again. A civil rights cause of action based on allegations that respondent knew he could not prove was patently frivolous and unjust. In addition, respondent's continued pursuit of Judge Ross based on meritless factual allegations is strong circumstantial evidence that he was motivated by vindictiveness, as found by the hearing judge in the present case.

Based on the above, we conclude that the record before us discloses clear violations of section 6068, subdivisions (c) and (g). Although the hearing judge found that respondent also

violated section 6106, we conclude that any such violation would be duplicative of the above violations and would not change our determination of the appropriate discipline.

The State Bar has asked that we find culpability of the charged sections based on respondent's conduct in both lawsuit #1 and lawsuit #4. We decline to do so, and instead, we look to the charges and find that the totality of respondent's conduct in filing and pursuing all four of the actions is the basis of those charges.

Turning to the degree of discipline, respondent contends that if we find culpability, the discipline should be no more than a reproval. The State Bar asserts that the hearing judge's discipline recommendation is appropriate. We, in turn, are obligated to exercise our independent judgement in recommending discipline. (*In re Morse* (1995)11 Cal.4th 184, 207.);

Respondent apparently takes issue with several of the hearing judge's findings in mitigation and aggravation. We find no merit to these arguments. Respondent's misconduct belies his claim that he acted in good faith and that his misconduct did not cause harm. In addition, the asserted prejudice from any delay in this proceeding is simply not cognizable; respondent's files regarding the four lawsuits were available for his review.

We agree with the hearing judge that respondent's lack of other discipline before and since his present misconduct is a mitigating factor. We also agree that respondent's community service and good character evidence are mitigating factors. However, contrary to respondent's assertion, we agree with the hearing judge that the good character witnesses were not aware of the full extent of respondent's misconduct, and therefore we discount the weight to be accorded this evidence. (See std. 1.2(e)(vi).) For the most part the witnesses testified that they

had a "general understanding" of the misconduct based in large measure on their conversations with respondent and his then-attorney, and most did not believe that respondent had done anything wrong. We do not further discount the good character evidence based on the other factors cited by the hearing judge.

We also agree with the hearing judge that the record clearly and convincingly establishes that respondent's misconduct harmed Judge Ross and the administration of justice and that respondent has shown no recognition of his wrongdoing. We do not agree that respondent's testimony in the State Bar proceeding regarding Baker's billings (one of the subjects of lawsuit #4) lacked candor. We do not find clear and convincing evidence that his testimony was dishonest or deceptive.

The hearing judge considered *Sorensen v. State Bar* (1991) 52 Cal.3d 1036, and *In the Matter of Varakin* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 179, to be instructive regarding the appropriate discipline. We agree. In *Sorensen,* the attorney sued the owner of a court reporting firm for fraud and deceit, seeking $14,000 in punitive damages, in connection with a simple $45 billing dispute. The court reporter incurred $4,375 in legal fees and expenses. The Supreme Court found that Sorenson pursued the action out of spite and vindictiveness and that "he acted on those base impulses by selecting the most oppressive and financially taxing means of redress...." (*Sorensen v. State Bar, supra,* 52 Cal.3d at p.1042.) The Court imposed one year stayed suspension with two years' probation on conditions including 30 days' actual suspension.

In *In the Matter of Varakin, supra,* 3 Cal. State Bar Ct. Rptr. 179, the attorney repeatedly filed frivolous motions and appeals in four different cases over a dozen years for the purpose of delay and harassment of his ex-wife and others. He continued this pattern despite being sanctioned numerous

times. Varakin greatly harmed the individuals involved and the administration of justice, lacked insight into his misconduct, expressed no remorse, and refused to mend his ways. We recommended, and the Supreme Court imposed, disbarment.

We agree with the hearing judge that respondent's misconduct was more extensive than Sorensen's but less than Varakin's. As was the hearing judge, we too are troubled by respondent's failure to have gained insight into his misconduct. He continues to paint himself as the victim despite the many courts that have held otherwise. The discipline imposed for the misconduct here must reflect this lack of insight as well as the harm to the victim and assurance to the public and bar that such conduct will not be tolerated. (*Sorensen v. State Bar, supra, 52* Cal.3d at p.1044.) We conclude that the hearing judge's discipline recommendation appropriately balances these values and the record as a whole.

RECOMMENDATION

For the foregoing reasons, we recommend that respondent Carey Brent Scott be suspended from the practice of law for a period of two years, that execution of the suspension be stayed, and that he be placed on probation for a period of two years, on the conditions of probation recommended by the hearing judge', including 60 days' actual suspension. We also recommend that respondent be ordered to take and pass the Multistate Professional Responsibility Examination within one year after the effective date of the Supreme Court order imposing discipline in this matter and furnish satisfactory proof of such passage to the Probation Unit of the Office of the Chief Trial Counsel within said period. Finally, we recommend that costs be awarded to the State Bar pursuant to Business and Professions Code section 6086.10 and that those costs be payable in accordance with section 6140.7

of that Code.

OBRIEN, J.*

We concur:

STOVITZ, P. J.
EPSTEIN, J.

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*Judge Pro Tem of the State Bar Court, appointed by the State Bar Board of Governors under rule 14 of the Rules of Procedure of the State Bar.

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2003 Cal. LEXIS 3499, *

SCOTT ON DISCIPLINE

S113328

SUPREME COURT OF CALIFORNIA

2003 Cal. LEXIS 3499

May 14, 2003, Decided

NOTICE: [*1] DECISION WITHOUT PUBLISHED OPINION

OPINION:

Petition for writ of review denied; recommended discipline imposed

Petition for writ of review DENIED. It is ordered that **CAREY BRENT SCOTT, State Bar No. 91813,** be suspended from the practice of law for two years, that execution of suspension be stayed, and that he be placed on probation for two years on condition that be actually suspended for 60 days. **Carey Brent**

Scott is also ordered to comply with the other conditions of probation recommended by the Review Department of the State Bar Court in its opinion filed October 25, 2002. It is further ordered that he take and pass the Multistate Professional Responsibility Examination within one year after the effective date of this order. (See *Segretti v. State Bar* (1976) 15 Cal.3d 878, 891, fn. 8, 126 Cal. Rptr. 793, 544 P.2d 929) Costs are awarded to the State Bar pursuant to Business & Professions Code section 6068.10 and payable in accordance with Business & Professions Code section 6140.7.

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UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

In Re:	)	Case No. SA96-23690
	)	
C. BRENT SCOTT,	)	Santa Ana, California
Debtor.	)	Friday, January 7, 2000
	)	11:00 A.M.
JOEL KRISSMAN	)	
Plaintiff,	)	Chapter 7
	)	
vs.	)	Adversary No. SA97-01172-LR
	)	
C. BRENT SCOTT,	)	
Defendant.	)	Trial re: complaint to determine dischargeability

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE LYNNE RIDDLE
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

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SANTA ANA, CALIFORNIA, FRIDAY, JANUARY 7, 2000, 11:00 A.M.

(Call to order of the Court.)

THE COURT: I regret the 15-minute delay in taking the bench I don't have an excuse. I was still putting my papers together. I didn't start on time, apparently.

Let me call this matter on for the calendar matter number one is a trial in the matter of Joel Krissman versus Brent Scott.

MR. BRODKIN: Good morning, Your Honor. Alan Brodkin appearing on behalf of plaintiff Krissman.

THE COURT: Thank you.

MR. BURD: Good morning, Your Honor. William Burd of Burd & Naylor appearing on behalf of defendant, C. Brent Scott.

THE COURT: Thank you. I have two matters on before me and the plaintiff has rested. The defendant has made a motion for the Court to proceed to find judgment in its favor under Federal Rule of Bankruptcy Procedure 7052 subsection (c).

And the other matter is a pending objection to the admission of an attachment to the plaintiff's Exhibit 2. Exhibit 2 includes two documents: one the judgment in the state court – underlying state court action of Scott versus these plaintiffs herein.

And the second being the order regarding sanctions

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plaintiff with intent to injure them.

Even if I were to admit, which I have expressly not, the finding of the state court in its conclusion that Scott's actions were, and I quote, "most frivolous," I take it that meaning more frivolous, and unwarranted actions, these findings do not equate to an actual intent to injure the plaintiffs.

They would equate, perhaps, to a recklessness, or perhaps to carelessness. But Geiger held expressly at page 978 that debts, and I quote, "Debts arising from recklessly or negligently inflicted injuries do not fall within the compass of Section 523 (a) (6)."

Plaintiff's urgings that I infer a subjective intent on Smith's part to injure from the facts that Scott filed his suite only two or three days after he called Mr. Krissman, and because Mr. Krissman did not return the telephone call within two or three days, or that Mr. Scott – and/or Mr. Scott took numerous depositions, including, in fact, virtually every member or partner of the plaintiff's firm, and others.

Or from the fact that Scott set the depositions in San Clemente rather than in Long beach where the plaintiff's offices are locate and that Scott testified at trial that he had filed the lawsuit to put a stop to the practices of the defendant's law firm.

That he also testified that it would only cost $150

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to file a lawsuit. That he also said that a lawsuit would prioritize the defendant law firm's calendar, and that he said that he filed the lawsuit to get the attention of the defendants.

And that he also asserted that prior to the filing of the lawsuit, he was aware that Mr. Jones had recommended and implored the defendant, Joel Krissman to call Mr. Cook, and finally , that Mr. Scott said that he filed the lawsuit not to recover damages but to teach the defendants a lesson.

I find, however, even given these suggestions, and these facts, that I am requested to infer some actual intent to harm has been, in my view, credibly and sufficiently explained by Mr. Scott to be consistent with his testimony.

That his intent was to one, protect his own agreement with the cooks, and he had two Cook clients, to prosecute their case, that he - - he - - it is also consistent with his testimony that he was wishing to protect his clients from a disturbance, or a concern in their mind that arose believing perhaps that his representation of them might jeopardize their rights to obtain a judgment and make a recovery that perhaps their case was not in the best hands, and that he was motivated to protect his own personal and emotional investment as well as financial investment in recovering proper compensation for his clients for their loss.

I find further support for my conclusion that Scott

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did not willfully intend to injure plaintiffs from the uncontroverted facts that he offered to settle for a nominal - - for the recovery of this nominal cost after he had, in fact, successfully defeated the plaintiffs in two motions for summary judgment before the state court, and by the fact that he did not immediately file bankruptcy upon the entry of a sizeable judgment against him, $218,000 as a sanctions judgment when, in fact, he filed bankruptcy four years - - approximately four years later.

And that in the interim between the sizeable judgment and

his filing for bankruptcy relieve, Mr. Scott paid some $128,000 of the $218,000 to the plaintiff in at least partial satisfaction of the judgment against him.

I believe that in the totality of the circumstances, those factors, while they are certainly facts occurring well after he had filed his actions, but show a pattern of consistency in my view to conduct himself responsibly towards the plaintiffs.

He may very well have been zealous, he may very well have been highly motivated in his pursuit of his litigation against the plaintiffs in the state court, but I have found nothing to show that he intentionally injured the plaintiffs.

Mr. Scott testified, and I believe him credible, that he - - and I find that he had a just cause to sue the plaintiffs based on his belief that his relationship with his clients was

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jeopardized. He believed the plaintiff's words to Mr. Cook undermined his credibility with his own clients, and he believed that he was being defamed, or that his firm was being disparaged.

Therefore, I conclude that Mr. Scott had no actual intent to harm the plaintiffs, and therefore the plaintiffs have failed to meet their burden that Mr. Scott acted willfully and maliciously in incurring an obligation to them.

Finally, even if Geiger had not been decided, and Cecchini were still the law in the Ninth Circuit, on the record before me, I would still, and again on this record, find that plaintiffs failed to meet their burden because even though Scott's acts were intentional, without a finding that his acts were wrongful, or even frivolous, or necessarily produced, harm Scott would prevail.

And even if Scott's acts were found to be frivolous, and even if they were found to be most frivolous, and that they necessarily produced a harm, I would still find for Scott based on the record before me because I would find from the evidence before me and on the record that he had a just cause or excuse.

A legal just cause that to vindicate his rights, and to protect himself and his client in his relationship with his client were proper legal excuse.

In conclusion, then plaintiff's -- excuse me, the defendant's motion for judgment under Federal Rule of
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Bankruptcy Procedure 7052 subsection (c) is granted. Judgment is for the defendant, Mr. Scott's debt to the plaintiffs is discharged in this bankruptcy proceeding.

Mr Burd, will you prepare an order?

MR. BRODKIN: May I be heard for a moment, Your Honor, before - -

THE COURT: Well, let me just ask if Mr. Burd will prepare an order?

MR. BURD: Yes, Your Honor.

THE COURT: Thank you. Go ahead, Mr. Brodkin.

MR. BRODKIN: Thank you, Your Honor.
Your Honor, first of all, let me set the record straight that it was Judge James Ross who issued the order, not Judge James Smith.

THE COURT: Excuse me, I misspoke.

MR. BRODKIN: So the order is clear.

Secondly, I want to make sure the court has received our trial brief that was served on December 28th and filed on: December 29th.

THE COURT: I received it and read it.

MR BRODKIN: Okay. Because we did not rely on Zelis. In fact, we had extensive discussions of Geiger. In addition, - -

THE COURT: Well, you had extensive discussions of Geiger at the Eighth Circuit level.

MR. BRODKIN: Thank you, Your Honor.

MR. BURD: Thank you, Your Honor.

(Whereupon the hearing in the above-entitled matter was adjourned.)

CERTIFICATE

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/ Patricia A. Petrilla January 9, 2000
Patricia A. Petrilla, Transcriber
AAERT CERT* 00113

STATE OF CALIFORNIA
BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

Inquiry Concerning Judge James Randal Ross, No.141	**DECISION AND ORDER IMPOSING PUBLIC CENSURE and ORDER BARRING JUDGE ROSS FROM RECEIVING ASSIGNMENTS**

This disciplinary matter concerns Judge James Randal Ross (retired), formerly a judge of the Orange County Superior Court. The Commission concludes that Judge Ross committed willful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute. The Commission censures Judge Ross and bars him from receiving assignments, appointments, or references of work from any California state court.

PROCEDURAL HISTORY

Judge Ross served as a judge of the Orange County Superior Court from 1983 to 1995. The events which are the subject of this matter took place during the 1992-1995 time period, while Judge Ross was serving as a full time Superior Court judge. Judge Ross retired on July 7, 1995.

This matter was commenced on December 11, 1996 with the issuance of a Notice of Formal Proceedings. The Notice was amended on June 2, 1997. Judge Ross filed answers to both Notices and denied any misconduct.

At the Commission's request, the Supreme Court appointed

three Special Masters to conduct an evidentiary proceeding and to prepare a written report.[1] Eighty witnesses testified during the hearing that commenced on July 29, 1997 and concluded on August 8, 1997. Thereafter the Masters prepared findings of fact and conclusions of law which were filed with the Commission on November 21,1997.

On January 2, 1998, Judge Ross filed objections to the Masters Report, and after further briefing, the matter was set for oral argument before the Commission on March 12, 1998. Nine members of the Commission participated.[2]

FINDINGS AND CONCLUSIONS

The First Amended Notice of Formal Proceedings sets forth five counts of alleged misconduct. Counts One, Four and Five allege unjudicial conduct on the bench. Count Two alleges use of the judicial office for personal gain, specifically promotion and sale of a book written by Judge Ross. Count Three alleges sleeping during certain specified jury trials.

The Commission has reviewed the record of proceedings before the Special Masters, and the arguments raised by the parties in their briefs before the Commission. The evidence of misconduct found by the Masters is clear and convincing. For the reasons set forth hereafter, the Commission adopts the

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[1] The Special Masters were Justice Patti S. Kitching of the Court of Appeal, Second Appellate District, Division Three, Judge John E. Dearman of the San Francisco County Superior Court, and Judge Michael T. Garcia of the Sacramento County Superior Court.

[2] The Commission normally consists of eleven members. There were two vacancies on the Commission at the time of oral argument.

findings of fact contained in the Special Masters' Report as its own. Based on the Masters' findings, the Commission dismisses County Three, and concludes that Respondent engaged in willful misconduct or conduct prejudicial as to Counts One, Two, Four and Five.

While the Commission adopts the Masters' detailed findings which are incorporated in this decision as an appendix, the facts are summarized here only as background for the Commission's ruling on discipline.

[Details of each Count followed in the original, for the next 22 pages.]

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Judge Ross, having resigned from office, is not subject to removal. The next available option is an order of public censure plus an order barring Judge Ross from sitting on assignment. The Commission was granted such authority by Proposition 190. [fn] Lesser sanctions, such as a public admonishment, would allow Judge Ross to sit again as a Superior Court judge on assignment.

Given the egregious misconduct presented by this case, the Commission orders that Judge Ross by publicly censured, and that he be barred from receiving any assignment, appointment, or reference of work from any California state court.

This decision shall constitute the order of public censure and bar.

The Commission's vote was 9 to 0.
Dated: April 30, 1998.

/s/ Robert C. Bonner
Robert C. Bonner,
Chairperson

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THE STATE BAR COURT
OF THE STATE BAR OF CALIFORNIA
HEARING DEPARTMENT - LOS ANGELES

In the Matter of	No. 94-0-17860
CAREY BRENT SCOTT, Bar No. 91813 A Member of the State Bar.	**REQUEST TO TAKE JUDICIAL NOTICE OF BANKRUPTCY COURT ORDER** Trial: Jan. 10, 2000 Time: 10:00 a.m. Place: State Bar Court, Judge: Carlos E. Velarde (by phone)

This court is requested to take judicial notice of the transcript of the order made by the U.S. Bankruptcy Court as follows:

1. Adversary Case No. SA97-01172-LR, in Bankruptcy Case No. SA 96-23690-LR, the adversary action entitled: Joel Krissman v. C. Brent Scott.

Trial was held on January 6 and 7, 2000, in the Central

District Bankruptcy Court, on a Complaint to Determine Dischargeability. Plaintiff Joel Krissman and his partner Thomas Stolpman testified, as did defendant, C. Brent Scott. The facts presented to the court were the identical facts being presented to this court, with virtually the same documents being submitted, i.e., the trial transcripts and court orders. On January 7, 2000, the Hon. Lynne Riddle, U.S. Bankruptcy Judge, ruled from the bench in a thorough discussion of the law and the facts.

Respondent requests the court take judicial notice of the above transcript and order under Evidence Code sections 452 and 453. A copy of the referenced transcript is attached for the court's convenience.

Dated: January 9, 2000.

PAOLI & PAOLI

By /s/ Sylvia L. Paoli
SYLVIA L. PAOLI
Attorneys for Respondent SCOTT

MEMORANDUM OF POINTS AND AUTHORITIES

1.

THE COURT IS REQUIRED TO TAKE JUDICIAL NOTICE OF RECORDS OF ANY COURT OF THIS STATE OR OF THE UNITED STATES.

[California] Evidence Code § 453 states that the court "shall take judicial notice of any matter specified in Section 452 if a party requests it" and gives notice and furnishes the court with adequate information on the requested matter. Evidence

Code § 452 lists the matters which may be judicially noticed, including: "(c) official acts of the legislative, executive, and judicial departments of the United States and of any state of the United States . . . . (d) records of (1) any court of this state or (2) any court of record of the United States or of any state of the United States." (See also *McGlothen v. Department of Motor Vehicles* (1977) 72 Cal.App.3d 1005 [140 Cal.Rptr. 168].)

Dated: January 9, 2000.

PAOLI & PAOLI

By_____
SYLVIA L. PAOLI
Attorneys for Respondent SCOTT

California Rules of Court:

Rule 953. Effective Date of Disciplinary Orders and Decisions

(a) [Effective Date of Supreme Court Orders] Unless otherwise ordered, all orders of the Supreme Court imposing discipline or opinions deciding causes involving the State Bar become final 30 days alter filing. The Supreme Court may grant a rehearing at any time before the decision or order becomes final. Petitions for rehearing may be filed within 15 days of the date the decision or order was filed. Unless otherwise ordered, when petitions for review pursuant to rules 952(c) and 952.5(c) are acted upon summarily, the orders of the Supreme Court are final forthwith and shall not have law-of-the-case effect in subsequent proceedings in the Supreme Court.

(b) [Effect of State Bar Court Orders When No Review Sought] Unless otherwise ordered, if no petition for review is filed within the time allowed by rule 952, subdivisions (a) (1,),and (d), or rule 952.5, subdivisions (a) and (b), as to a recommendation of the State Bar Court for the disbarment, suspension, or reinstatement of a member, the vacation of a stay, or modification of the duration or conditions of a probation, the recommendations of the State Bar Court shall be filed as an order of the Supreme Court following the expiration of the time for filing a timely petition. The Clerk of the Supreme Court shall mail notice of this effect to the member at his or her address pursuant to section 6002.1 and to the State Bar.

(c) [Effect of State Bar Court Orders in Moral Character Proceedings When No Review Sought] Unless otherwise ordered, if no petition for review is filed within the time allowed by rule 952.6, subdivision (a), as to a recommendation

of the State Bar Court in moral character proceedings, the recommendation of the State Bar Court shall be filed as an order of the Supreme Court following the expiration of the time for filing a timely petition. The Clerk of the Supreme Court shall mail notice of this effect to the applicant's last address provided to the State Bar or the applicant's attorney of record, if any, and to the State Bar. [Amended effective February 1, 1996)